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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOSE FRANCISCO CERVANTES, Defendant and Appellant.	E068256 (Super.Ct.No. FWV17001239) OPINION

APPEAL from the Superior Court of San Bernardino County. Stephan G. Saleson, Judge. Affirmed as modified.

Aaron J. Schechter, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant and appellant Jose Francisco Cervantes beat his girlfriend during an argument. Pursuant to a plea agreement, defendant pled no contest to infliction of corporal injury on a cohabitant within seven years of a prior domestic violence conviction. (Pen. Code,[1] § 273.5, subds. (a) & (f)(1).) In return, defendant was placed on formal probation for a period of three years with various terms and conditions of probation. On appeal, defendant challenges four of his probation conditions, claiming they are unconstitutionally overbroad and/or vague, and should be stricken or modified. Specifically, he argues (1) the electronics-search condition is unconstitutionally overbroad because it impermissibly restricts his First and Fourth Amendment rights, and (2) the residential search condition, the weapons condition, and the change of residence condition are unconstitutionally vague and overbroad. We agree modification is required as to some of the challenged probation conditions, but reject defendant's remaining arguments.

II

FACTUAL AND PROCEDURAL BACKGROUND[2]

On March 18, 2017, defendant and his girlfriend of four years got into an argument. During the argument, defendant struck his girlfriend at least six times in her

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The factual background is taken from the police and probation reports.

face and mouth and kicked her twice on her side and shoulder. As a result, defendant's girlfriend sustained a black eye, bruising on both of her arms, and scratches on her face. Defendant's girlfriend reported that defendant had injured her before in a previous domestic violence incident, resulting in her being left unconscious in a street outside of their residence. Based on the severity of the previous incident, defendant's girlfriend did not want defendant placed in custody out of fear of what he would do to her upon his release.

On March 21, 2017, a felony complaint was filed charging defendant with inflicting corporal injury on a cohabitant or girlfriend within seven years of a prior domestic violence conviction. (§ 273.5, subds. (a) & (f)(1).) Defendant's prior domestic violence conviction under section 273.5, subdivision (a), occurred on October 27, 2015, in San Bernardino County Superior Court, case No. FSB1503135. At the time of the instant case, defendant was on probation in connection with his prior domestic violence conviction.

On March 29, 2017, pursuant to a plea agreement, defendant pled no contest to the charge and admitted to violating probation in case No. FSB1503135.

On April 27, 2017, the trial court granted defendant formal probation for a period of three years with various terms and conditions of probation, including term Nos. 008A (change of residence condition), 008F (residence search condition), 009 (weapons condition), 010B (electronics-search condition). Defendant was also ordered to serve 210 days in county jail, with credit for time served, and to pay various fines and fees. During

the hearing, defense counsel objected to the electronics-device search condition, arguing the condition had no relationship to the offense and violated defendant's due process rights.[3] The prosecutor responded that many domestic violence offenders use cellphones to harass, threaten, stalk, and annoy their victims, and that the electronics-device search condition would allow probation to effectively monitor whether defendant was using his cellphone to contact the victim. The trial court agreed with the prosecutor, reasoning that the condition would allow probation to "properly monitor domestic violence situations."

On May 1, 2017, defendant filed a timely notice of appeal.

III

DISCUSSION

Defendant challenges four of his probation conditions, arguing they are unconstitutionally overbroad and/or vague, and should be stricken or modified.

"When an offender chooses probation, thereby avoiding incarceration, state law authorizes the sentencing court to impose conditions on such release that are 'fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer.' " (*People v. Moran* (2016) 1 Cal.5th 398, 402-403, quoting § 1203.1, subd. (j).) Thus, "a sentencing court has 'broad discretion to impose conditions to foster rehabilitation and to protect public

[3] Defendant did not object to the remaining probation conditions challenged on appeal.

safety pursuant to Penal Code section 1203.1.' " (*Moran*, at p. 403, quoting *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*).) "If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the probationer, who is "not entitled to the same degree of constitutional protection as other citizens." ' " (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355 (*O'Neil*), quoting *People v. Lopez* (1998) 66 Cal.App.4th 615, 624 (*Lopez*).)

Judicial discretion in selecting the conditions of a defendant's probation "is not unlimited." (*O'Neil, supra*, 165 Cal.App.4th at p. 1355.) A probation condition is unreasonable and will not be upheld if it (1) has no relationship to the crime of which the defendant was convicted, (2) relates to conduct that is not criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality. (*People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (*Olguin*); *O'Neil*, at p. 1355.) "This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*Olguin*, at p. 379.) Thus, as a general rule, "even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality." (*Id*. at p. 380.)

However, "[j]udicial discretion to set conditions of probation is further circumscribed by constitutional considerations." (*O'Neil, supra*, 165 Cal.App.4th at p. 1356.) Under this second level of scrutiny, if an otherwise valid condition of probation impinges on constitutional rights, the condition must be carefully tailored so as to be

reasonably related to the compelling state interest in the probationer's reformation and rehabilitation. (*Ibid*.; *People v. Bauer* (1989) 211 Cal.App.3d 937, 942 (*Bauer*); *In re Sheena K.* (2007) 40 Cal.4th 875, 890 (*Sheena K.*); *In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) "The essential question . . . is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

Challenges to probation conditions ordinarily must be raised in the trial court or appellate review of those conditions will be deemed forfeited. (*People v. Welch* (1993) 5 Cal.4th 228, 234-235 [extending the forfeiture rule to a claim that probation conditions are unreasonable, when the probationer fails to object on that ground in the trial court].) However, the forfeiture rule does not apply, and a defendant who did not object to a probation condition at sentencing may do so on appeal if the appellate claim "amount[s] to a 'facial challenge' " that challenges the condition on the ground its "phrasing or language . . . is unconstitutionally vague or overbroad" and the determination whether the condition is constitutionally defective "does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court." (*Sheena K.*, *supra*, 40 Cal.4th at pp. 885, 887.) Thus, a challenge to a probation condition on the ground it is unconstitutionally overbroad or vague "that is capable of correction without reference to

the particular sentencing record developed in the trial court can be said to present a pure question of law" (*id*. at p. 887, italics omitted), and such a challenge is reviewable on appeal even if it was not raised in the trial court (*id*. at p. 889). To the extent defendant raises a facial challenge to the constitutional validity of the residence reporting condition, the claim is not forfeited by defendant's failure to raise it below. (*Ibid*.)

"Generally, we review the court's imposition of a probation condition for an abuse of discretion." (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1143, citing *Carbajal*, *supra*, 10 Cal.4th at p. 1121.) However, we independently review constitutional challenges to a probation condition. (*In re Shaun R.*, at p. 1143.) Based on the foregoing, we address the merits of defendant's arguments *post*.

A. *Electronics-Search Condition*

Defendant's electronics-search condition here provided as follows: "Submit to search and seizure by a government entity of any electronic device that you are an authorized possessor of pursuant to PC 1546.1(c)(10)." Defendant argues the electronics-search condition should be stricken because it "permits unfettered governmental access to [defendant]'s computer, cell phone, electronic devices, and all digital media," and it is neither related to defendant's crime nor to deterring future criminality. Defendant further argues the electronics-search condition is unconstitutionally overbroad because it impermissibly restricts his First and Fourth Amendment rights.[4]

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[4] We note that currently, there is a split of authority regarding the validity of broad electronics-search conditions of probation, and the issue is pending before the California Supreme Court. (See *People v. Trujillo* (2017) 15 Cal.App.5th 574 (*Trujillo*),

[footnote continued on next page]

Our colleagues in Division One of this court recently addressed a challenge by a defendant subjected to an electronics-search probation condition in *Trujillo, supra*, 15 Cal.App.5th 574, which we discuss in detail for its persuasive value. (Cal. Rules of Court, rule 8.1115(e)(1).) The defendant's crime, like defendant's here, had no relation to the probation condition, and the main issue, as here, was whether the condition was reasonably related to future criminality. The court explained that "a probation condition 'that enables a probation officer to supervise his or her charges effectively is . . . "reasonably related to future criminality." ' [Citations.] Because the probation officer is responsible for ensuring the probationer refrains from criminal activity and obeys all laws during the probationary period, the court may appropriately impose conditions intended to aid the probation officer in supervising the probationer and promoting his or her rehabilitation. [Citations.] 'This is true "even if [the] condition . . . has no relationship to the crime of which a defendant was convicted." ' " (*Trujillo*, at p. 583.)

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review granted Nov. 29, 2017, S244650; *In re R.S.* (2017) 11 Cal.App.5th 239, review granted July 26, 2017, S242387; *People v. Bryant* (2017) 10 Cal.App.5th 396, review granted June 28, 2017, S241937; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849; *In re A.S.* (2016) 245 Cal.App.4th 758, review granted May 25, 2016, S233932; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628; *People v. Nachbar* (2016) 3 Cal.App.5th 1122 (*Nachbar*), review granted Dec. 14, 2016, S238210; *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240.)

In *Trujillo*, the defendant's crimes were first time offenses, but his record showed he had substantial risk factors relevant to reoffending, and our colleagues observed the trial court had imposed the condition aware of these facts and the probation department's conclusion that he was at risk and would require close supervision of his daily activities to support a successful probation. (*Trujillo*, *supra*, 15 Cal.App.5th at p. 583.) The trial court had found that in order to supervise the defendant, the probation department needed to be able to view the contents of his computer and cell phone. Thus, the Court of Appeal pointed out the trial court "did not impose this condition as a matter of routine, but considered the specific facts relevant to Trujillo's case." (*Ibid*.) Under the circumstances, our colleagues held the trial court did not abuse its discretion: "If the court permits this young convicted felon to avoid prison through probation despite his violent offenses, the court has the authority to take steps to help ensure Trujillo will remain crime free and that public safety objectives are satisfied. As our high court has observed, the purpose of requiring Fourth Amendment search waivers as a probation condition is ' " 'to determine not only whether [the probationer] disobeys the law, but also whether he obeys the law. Information obtained [from an unexpected and unprovoked search] afford[s] a valuable measure of the effectiveness of the supervision given the defendant . . . .' " ' [Citations.] The trial court had a reasonable basis to conclude the most effective way to confirm Trujillo remains law abiding is to permit his electronic devices to be examined, rather than relying on a meeting or a telephone conversation. This required Fourth Amendment waiver is not open-ended, it applies only

during the probation period. If Trujillo is successful at his probation, the Fourth Amendment waiver will terminate and his electronic devices will again be completely private. The court made the factual determination that the electronics-search condition is necessary to provide appropriate supervision for Trujillo while he is on probation. Under [*People v. Lent* (1975) 15 Cal.3d 481] and *Olguin*, the court did not err in reaching this conclusion." (*Id*. at pp. 583-584.)

The *Trujillo* court further rejected the notion, suggested in cases such as *In re Erica R.* (2015) 240 Cal.App.4th 907, that the Trujillo defendant's failure to use an electronic device in committing his crimes or the lack of any connection between such a device and the crimes rendered the search condition unreasonable as a matter of law. (*Trujillo*, *supra*, 15 Cal.App.5th at p. 584.) As the *Trujillo* court explained, whether a condition is reasonably related to reducing future criminality requires a focus on the particular facts and circumstances, not bright-line rules; that the propriety of a specific probation condition "necessarily depends on a myriad of tangible and intangible factors before the trial court, including the defendant's particular crime, criminal background, and future prospects. It is for the trial court, with the assistance of the probation officer and other experts, to determine the probation conditions that will permit effective supervision of the probationer." (*Trujillo*, *supra*, 15 Cal.App.5th at p. 584.) And it was the appellate court's role to decide whether the lower court had a reasonable factual basis to decide the condition would assist probation in supervising the defendant. (*Id*. at

pp. 584-585.) In *Trujillo*, the facts supported the conclusion that the trial court's decision did have such a basis.

We are persuaded by *Trujillo's* reasoning and apply it in this case. Here, the trial court had before it the probation report recounting defendant's criminal history, probation violation, and factors in aggravation and mitigation affecting probation. The court was also aware of the probation department's conclusions that defendant did not appear to be amenable to rehabilitative efforts of the probation department and that the probation officer did not support the plea agreement of allowing defendant another chance at probation. Defendant's history of noncompliance on probation, his past and current violence, and his criminal personality shows he requires more intensive supervision to ensure his compliance with the terms and conditions of his probation. In fact, defendant was on probation for a previous domestic violence attack on the same victim at the time he committed the instant offense, demonstrating defendant is someone who requires close supervision. With respect to the prior domestic violence incident, the victim reported defendant had left her badly injured and lying unconscious in the street outside of their home. In light of defendant's recidivism and his proclivity for violent behavior toward the victim, close monitoring of defendant's electronic devices is necessary to ensure the victim's safety and to aid in defendant's rehabilitation. As the trial court found, the electronics-search condition was necessary in this case to properly monitor defendant. Without this condition in place, probation might be unable to determine whether defendant is contacting the victim, as victims of domestic violence are often unwilling to

come forward against their abusers. Allowing probation to search defendant's electronic devices to ensure he is not contacting the victim is thus narrowly tailored to the purpose of this condition.

As in *Trujillo*, here the court had reasonable grounds to conclude that an effective way to confirm defendant remains compliant and law-abiding during his period of supervision is to permit his electronic devices to be examined, rather than merely relying on meetings or telephone conversations. Because the electronics-search condition is reasonably related to defendant's supervision, it is reasonably related "to his rehabilitation and potential future criminality." (*Olguin*, *supra*, 45 Cal.4th at p. 380.) We conclude the court did not abuse its discretion in ordering the condition under *Lent*, *supra*, 15 Cal.3d 481.

Additionally, as our colleagues did in *Trujillo*, we reject defendant's argument that the electronics-search condition is unconstitutionally overbroad as violating his fundamental privacy rights under *Riley v. California* (2014) ____ U.S. ____, [134 S.Ct. 2473, 189 L.Ed.2d 430] (*Riley*). In *Riley*, the United States Supreme Court held that the warrantless search of a suspect's cell phone implicated and violated the suspect's Fourth Amendment rights. (*Riley*, at p. ___ [134 S.Ct. at pp. 2492-2493].) The court explained that modern cell phones, which have the capacity to be used as mini-computers, can potentially contain sensitive information about a number of areas of a person's life. (*Id.* at p. ___ [134 S.Ct. at p. 2489].) The court emphasized, however, that its holding was only that cell phone data is subject to Fourth Amendment protection, "not that the

information on a cell phone is immune from search." (*Riley*, at p. ___ [134 S.Ct. at p. 2493].)

In *Trujillo*, the appellate court distinguished *Riley*, and followed authority explaining that the overbreadth analysis is materially different from the warrant requirement at issue in that case. (*Trujillo*, *supra*, 15 Cal.App.5th at p. 587.) The court observed that probationers do not enjoy the absolute liberty to which law-abiding citizens are entitled, and that courts routinely uphold broad probation conditions permitting searches of a probationer's residence without a warrant or reasonable cause. (*Id.* at pp. 587-588.) Like the defendant in *Trujillo* (*id.* at pp. 588-589), defendant does not challenge the probation condition authorizing officers to conduct random and unlimited searches of his residence at any time and for no stated reason, and he made no showing that a search of his electronic devices would be any more invasive than an unannounced, without cause, warrantless search of his residence. Here, as in *Trujillo*, the factual record supports a conclusion that the electronics-search condition is necessary to protect public safety and to ensure defendant's rehabilitation during his three-year supervision period, and a routine search of defendant's electronic data "is strongly relevant to the probation department's supervisory function." (*Id.* at p. 588.) We adopt a similar conclusion as *Trujillo*: "Absent particularized facts showing the electronics-search condition will infringe on [defendant's] heightened privacy interests, there is no reasoned basis to conclude the condition is constitutionally overbroad or to remand for the court to consider a more narrowly drawn condition." (*Id.* at p. 589.)

Defendant suggests we should follow the decisions invalidating the condition as overbroad, namely, *In re J.B.* (2015) 242 Cal.App.4th 749 (*J.B.*), *In re Stevens* (2004) 119 Cal.App.4th 1228 (*Stevens*), *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*), and *United States v. Lifshitz* (2d Cir. 2004) 369 F.3d 173 (*Lifshitz*). He argues the condition is not narrowly tailored to his individualized situation and allows for a much greater intrusion on his constitutionally protected rights than is necessary to achieve the government's interest in ensuring defendant is abiding by the terms of his probation.

We decline to follow the cases cited by defendant. These cases declined to read *Olguin* as sanctioning imposition of electronics-search conditions without evidence the probationer is likely to use his or her electronic devices or social media for proscribed activities. The *J.B.* court distinguished *Olguin* on the ground it involved an adult probationer and none of the privacy concerns articulated in *Riley*. (*J.B.*, *supra*, 242 Cal.App.4th at p. 757.) The court held that reasonableness is not judged solely by whether the condition itself would be reasonably effective in preventing future criminality, but whether it could be seen as a reasonable means for deterring future crime by this *particular* minor based on his history. (*Ibid*.) In addition, *J.B.*, and *Stevens*, *supra*, 119 Cal.App.4th 1228, involved juvenile probationers. In juvenile cases, the conditions must be tailored to fit the rehabilitative needs of the minor. (Welf. & Inst. Code, § 730.)

Furthermore, *Lifshitz, supra,* 369 F.3d 173, involved a probation condition requiring the defendant to consent to the installation of a monitoring system on his computer. (*Id*. at p. 177 & fn. 3.) The appellate court found that the record contained "very little information . . . about what kind of monitoring the probation condition authorizes" (*id*. at p. 190) and indicated the condition might be overbroad depending on whether the monitoring "focuses attention upon specific types of unauthorized materials," or on "all activities engaged in by the computer user" (*id*. at p. 191, fn. omitted). Since the *Lifshitz* court could not determine whether the condition was overbroad, it remanded the case so the district court could "evaluate the privacy implications of the proposed computer monitoring techniques as well as their efficacy as compared with computer filtering." (*Id*. at p. 193.) In this case, defendant was not required to consent to computer monitoring.

Appleton also does not aid defendant. In *Appleton*, *supra,* 245 Cal.App.4th 717, the court rejected an electronics-search condition on the premise that *Riley* held that police could not ordinarily search a smartphone incident to arrest, and that, absent other exigent circumstances, a warrant was required to make such a search. (*Id.* at pp. 723-724.) However, the court in *Trujillo*, *supra*, 15 Cal.App.5th 574, and *Nachbar*, *supra,* 3 Cal.App.5th 1122 disagreed with *Appleton*. We recognize that our high court has granted review in *Trujillo* and *Nachbar* pending resolution of *In re Ricardo P.*, *supra*, 241 Cal.App.4th 676. Pending further direction from our high court, we continue to adhere to the views expressed in *Trujillo* and *Nachbar*, namely, that the "privacy concerns voiced

in *Riley* are inapposite in the context of evaluating the reasonableness of a probation condition." (*Nachbar*, at p. 1129.)

The court in *Appleton* struck a probation condition allowing probation access to recordable media and computers based on the fact personal information may be on such devices, thus making the intrusion too broad. (See *Appleton*, *supra*, 245 Cal.App.4th at pp. 728-729.) As we have noted, the court in *Appleton* relied heavily on the discussion in *Riley*, about the privacy interests an individual has in his or her smartphone, to find a search warrant was required to access this and similar devices. The *Riley* court did not hold that electronic devices are immune from search, but only that they cannot be searched incident to lawful arrest as an ordinary exception to the warrant requirement. (See *Riley*, *supra*, ___ U.S. ___ [134 S.Ct. 2473].) However, the instant case does not involve an exception to the warrant clause, as was the case in *Riley*. Rather, it involves a specific probation condition imposed by the trial court that restricts the exercise of the constitutional rights of defendant, who must be supervised for the rehabilitation and prevention of crime.

Riley is therefore inapposite since it arose in a different Fourth Amendment context. As noted, *Riley* involved the scope of a warrantless search incident to arrest of a person who had not committed a crime beyond a reasonable doubt and who was not on supervised release. (*Riley*, *supra*, ____ U.S. at p. ____ [134 S.Ct. at pp. 2480-2481].) The balancing of the state's interests and the defendant's privacy interests is very different in this case, which involves the probation supervision of a convicted felon with

prior convictions for domestic violence. Moreover, *Riley* did not consider the constitutionality of conditions of probation, parole, or mandatory supervision. Persons on probation do not enjoy the absolute liberty to which every citizen is entitled and the court may impose reasonable conditions that deprive an offender of some freedoms enjoyed by law-abiding citizens. (*United States v. Knights* (2001) 534 U.S. 112, 119 [probationers]; see *In re Q.R.* (2017) 7 Cal.App.5th 1231, 1238, review granted April 12, 2017, S240222 [*Riley* involved a person's "preconviction expectation of privacy"].)

For these reasons, we conclude the electronics-device search condition is not overbroad.

B. *Remaining Three Conditions*

Defendant contends that various words and phrases in the residential search condition, the weapons condition, and the change of residence condition are both vague and overbroad. The People agree in part, and disagree in part. The People agree that to avoid vagueness, an explicit knowledge requirement may be added to the residential search condition and the change of residence condition may be modified to allow for notification within 24 hours of a move. Otherwise, the People argue the challenged conditions should be upheld as written.

At sentencing, the trial court imposed the following terms and conditions of probation:

"Permit visits and searches of places of residence by agents of the Probation Department and/or law enforcement for the purpose of ensuring compliance with the

terms and conditions of probation; not do anything to interfere with this requirement, or deter officers from fulfilling this requirement, such as erecting any locked fences/gates that would deny access to probation officers, or have any animals on the premises that would reasonably deter, threaten the safety of, or interfere with officers enforcing this term." (Term No. 008F.)[5]

"Neither possess nor have under your control any dangerous or deadly weapons, or explosive devices or materials to make explosive devices." (Term No. 009.)[6]

"Keep the probation officer informed of place of residence and cohabitants: give written notice to the probation officer twenty-four (24) hours prior to any changes. Prior to any move provide written authorization to the Post Office to forward mail to the new address." (Term No. 008A.)

Defendant raised no objection in the trial court with respect to the above challenged conditions. Where a claim that a probation condition is facially overbroad and violates fundamental constitutional rights is based on undisputed facts, it may be treated as a pure question of law, which is not forfeited by failure to raise it in the trial court. (*Sheena K.*, *supra*, 40 Cal.4th 875, 888-889; *People v. Welch* (1993) 5 Cal.4th 228, 235.) To the extent defendant's challenges raise pure questions of law, we will reach the merits of defendant's claim. We focus solely on the constitutionality of the

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[5] We note the trial court's minute order states "place of residence," and the probation report states "places of residence."

[6] We note the trial court's minute order of term No. 009 omits the language concerning explosive devices.

condition, not whether it is reasonable as applied to defendant. (See *People v. Lent*, *supra*, 15 Cal.3d 481, 486 [test for reasonableness of probation conditions].) By failing to object below, defendant has forfeited all claims except a challenge "based on the ground the condition is vague or overbroad and thus facially unconstitutional." (*Sheena K.*, *supra*, 40 Cal.4th at p. 878.)

Trial courts must fashion precise supervision conditions so the probationer knows what is required. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) A condition is invalid if it is " ' " 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " ' " (*People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1128 (*Quiroz*).) Nor may a court impose overbroad supervision conditions. Where a condition impinges on a constitutional right, it must be carefully tailored and reasonably related to the compelling state interest in reformation and rehabilitation. (*Ibid.*; *Sheena K.*, *supra*, 40 Cal.4th at p. 890.) A "court may leave to the discretion of the probation officer the specification of the many details that invariably are necessary to implement the terms of probation. However, the court's order cannot be entirely open-ended." (*O'Neil, supra*, 165 Cal.App.4th at pp. 1358-1359 [probation condition forbidding defendant from associating with all persons designated by his probation officer was "overbroad and permit[ted] an unconstitutional infringement on defendant's right of association"].) "If a probation condition serves to rehabilitate and protect public safety, the condition may 'impinge upon a constitutional right otherwise enjoyed by the

probationer, who is "not entitled to the same degree of constitutional protection as other citizens." ' " (*Id.* at p. 1355, quoting *People v. Lopez* (1998) 66 Cal.App.4th 615, 624.)

1. Residential Search Condition

Defendant argues the residential search condition, term No. 008F, is improperly vague and overbroad as to the terms "places of residence," "interfere," and "deter," as well as the "any animals" clause. Specifically, he believes that it is unclear whether "places of residence" includes temporary places where he may stay overnight, such as the home of a parent, relative, or girlfriend he visits occasionally. Defendant also asserts that it is unclear what is meant by the words "interfere" and "deter" because it is impossible for defendant to know "everything what *might* deter a given officer or what *might* interfere with the residency search condition," such as locking doors for his own safety or inadvertently leaving a child's skateboard in the front yard that an officer might trip on. He further argues that the clause prohibiting him from having "any animals" that would "deter" and "interfere with" or "threaten the safety of" officers enforcing this term "is so vague as to lack any reasonable warning of what is prohibited." He believes that the condition unreasonably restricts his legitimate interest in ensuring the security of himself and his family, and that the ambiguous language of the condition may bring innocent conduct subject to violation.

As previously noted, "A probation condition 'must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a challenge on the ground of vagueness.

[Citation.]" (*Sheena K., supra*, 40 Cal.4th at p. 890.) "[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' [Citation.] The rule of fair warning consists of 'the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders' [citation], protections that are 'embodied in the due process clauses of the federal and California Constitutions.' [Citations.]" (*Sheena K.*, at p. 890, quoting *People v. Castenada* (2000) 23 Cal.4th 743, 751.)

"The vagueness doctrine bars enforcement of ' "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." [Citations.]' [Citation.] A vague law 'not only fails to provide adequate notice to those who must observe its strictures, but also "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Citation.]' [Citation.] In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that 'abstract legal commands must be applied in a specific context,' and that, although not admitting of 'mathematical certainty,' the language used must have ' "reasonable specificity." ' [Citation.]" (*Sheena K., supra*, 40 Cal.4th at p. 890, italics omitted.)

Initially, the term "places of residence" is not vague and/or overbroad. "A probation condition should be given 'the meaning that would appear to a reasonable,

objective reader.' " (*Olguin*, *supra*, 45 Cal.4th at p. 382.) A reasonable interpretation of the phrase "places of residence" makes it clear that defendant must permit searches of any place in which he resides, meaning any place where he lives "permanently" or "continuously." (See Black's Law Dict. (5th Ed.) at p. 1176 [defining "reside" as "to remain or stay, to dwell permanently or continuously, to have a settled abode for a time, to have one's residence or domicile"]; Black's Law Dict., *supra*, at p. 1176 [defining "residence" as "[p]ersonal presence at some place of abode with no present intention of definite and early removal and with purpose to remain for undetermined period, not infrequently . . . ."].) While defendant requests for the term to be changed to "domicile," such a modification would prevent a probation officer from searching multiple residences, as a defendant may have two residences, but one domicile. " 'Because residence is not truly a synonym for domicile and its meaning in a particular statute is often subject to differing interpretations [citation], it is now well established that " 'residence' is a term of varying import and its statutory meaning depends upon the context and purpose of the statute in which it is used." ' " (*People v. Grays* (2016) 246 Cal.App.4th 679, 686, quoting *People v. McCleod* (1997) 55 Cal.App.4th 1205, 1217.) Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. (See Black's Law Dict., *supra*, at p. 1176.) "Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it

one's domicile." (*Id*. at pp. 1176-1177.) As such, a person may have two places of residence, but only one domicile, as illustrated by defendant.

"Proper supervision includes the ability to make unscheduled visits and to conduct unannounced searches of the probationer's residence. Probation officer safety during these visits and searches is essential to the effective supervision of the probationer and thus assists in preventing future criminality." (*Olguin, supra*, 45 Cal.4th at p. 381.) Officers must have ready access to the probationer's residence to verify the probationer's compliance and prevent future criminality such as domestic violence. Of course, locked gates and fences, and potentially dangerous animals create unreasonable obstacles to monitoring probationers. (*Ibid*. ["Animals can be unpredictable and potentially dangerous when faced with a stranger in their territory, and some pose a great or even life-threatening hazard to persons in these circumstances."].) While "it would be unreasonable and impractical to leave it to a probationer to decide which pets could interfere with an officer's supervisory duties, . . . it is reasonable to place the burden on a probationer to inform the probation officer which animals are present at his or her residence." (*Id*. at p. 382.)

However, the condition prohibiting defendant from "do[ing] anything to interfere" with the searches does not specify that defendant know that he is doing something that interferes or deters. It is vague because defendant may inadvertently do something to interfere with a search without " 'know[ing] what is required of him.' " (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) For instance, as defendant illustrated, he could inadvertently

deter officers from visiting and searching by locking his door when he leaves his residence, or locking a gate for safety. Therefore, the condition should be modified to add a knowledge requirement, as the People concede.

As to the prohibition against having any animals that would interfere with, deter, or threaten the safety of officers, similar probation conditions have been upheld by the California Supreme Court, which has concluded there is no fundamental constitutional right to own unregulated animals. (*Olguin*, *supra*, 45 Cal.4th at p. 385, fn. 3.) Because no constitutional right is involved, an overbreadth claim cannot lie. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Nevertheless, there is a distinction between a probation condition that requires notice to the probation officer about the presence of animals and one that prohibits "hav[ing] any animals on the premises that would reasonably deter, threaten the safety of, or interfere with, officers enforcing the term." To the extent the condition does not provide notice to defendant as to the type of animal that would be impermissible, it is vague. (*Sheena K.*, at p. 890.) We therefore will modify the condition to instead require defendant to notify the probation officer of any animals at his residence, and to comply with the probation officer's reasonable requests concerning animals.

Accordingly, to prevent arbitrary enforcement and provide clear notice, we modify the term to include an explicit knowledge requirement. (See *Sheena K.*, *supra*, 40 Cal.4th at pp. 891-892.) We modify term No. 008F as follows: Permit visits and searches of places of residence by agents of the probation department and/or law enforcement for the purpose of ensuring compliance with the terms and conditions of probation; not

knowingly do anything to interfere with this requirement, or knowingly deter officers from fulfilling this requirement. Probationer shall notify the probation officer of any locked gates and fences, and provide the probation officer with the means to access probationer's residence without having probationer unlock a gate or fence (for example, by supplying the probation officer with a key to the gate or fence). Probationer shall notify the probation officer of any animals at his residence and comply with the officer's reasonable requests concerning animals.

2. Weapons Condition

Defendant also contends that the part of the condition prohibiting possession of a "dangerous or deadly weapon" is unconstitutionally vague and overbroad because it can include common items, like kitchen knives, screwdrivers, razors, hammers, baseball bats, or garden tools, that could be used to inflict serious injury on another. He believes the condition should be modified to state "objects designed for primary use as or objects intended to be used as" dangerous and deadly weapons. We disagree.

In determining whether a condition of probation is sufficiently definite, a court is not limited to the condition's text. (*People v. Hall* (2017) 2 Cal.5th 494, 500 (*Hall*), citing *People v. Lopez* (1998) 66 Cal.App.4th 615, 630-632.) "We must also consider other sources of applicable law [citation], including judicial construction of similar provisions." (*Hall*, at p. 500.)

Where a probation condition implements statutory provisions that apply to the probationer independent of the condition and does not infringe on a constitutional right, it

is not necessary to include in the condition an express scienter requirement that is necessarily implied in the statute. (*People v. Kim* (2011) 193 Cal.App.4th 836, 843 (*Kim*).) Section 29800 prohibits persons convicted of felonies from possessing firearms. As a probation condition that implements that statute, the condition precluding possession of a firearm should be given the same interpretation, even if the condition does not incorporate the statute by reference. (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 591 (*Rodriguez*), overturned on a different ground in *Hall*, *supra*, 2 Cal.5th at p. 503, fn. 2.)

In *Hall*, *supra*, 2 Cal.5th at p. 494, the California Supreme Court disapproved of cases holding that an express knowledge requirement was necessary to prevent unwitting violations of possessory probation conditions. (*Id*. at p. 503, fn. 2, disapproving of *In re Kevin F*. (2015) 239 Cal.App.4th 351, 361-366 & *People v. Freitas* (2009) 179 Cal.App.4th 747, 751-752.) The court also disapproved of cases holding that possessory probation conditions must include an express knowledge requirement where the prohibited item was not criminalized by statute but was merely related to criminality. (*Hall*, at p. 503, fn. 2, disapproving *In re Ana C.* (2016) 2 Cal.App.5th 333, 347-350 and *Rodriguez*, *supra*, 222 Cal.App.4th at p. 594.) That holding informs our reasoning and compels the result that no express knowledge element is required.

Defendant attempts to distinguish *Hall*, arguing "the issue here is not the *Hall* issue of whether [defendant] needs *knowing* possession of such items to be found in violation of this condition" but specificity on what items constitute "dangerous and

deadly weapon." We disagree. *Hall's* discussion of how the Supreme Court has interpreted criminal statutes—relying solely on the presumption that scienter is required to reject vagueness challenges based on the lack of an explicit mens rea element—demonstrates that the specific case law applicable to possession probation conditions was not dispositive to the court's analysis. Moreover, merely because a condition could have been drafted with more precision does not make it unconstitutional. (*Hall, supra*, 2 Cal.5th at p. 503 ["[T]he question before us is not whether this degree of precision would be desirable in principle, but whether it is constitutionally compelled."].)

As noted in *People v. Moore* (2012) 211 Cal.App.4th 1179, 1186 (*Moore*), a court may not revoke a defendant's probation absent a finding that the defendant willfully violated the terms and conditions of his or her probation. (See *People v. Patel* (2011) 196 Cal.App.4th 956, 960 [noting the well-settled rule that a probationer cannot be punished for presence, possession, or association without proof of knowledge]; *Kim, supra*, 193 Cal.App.4th at p. 846 [knowledge is an implicit element in the concept of possession].) The unwitting possession of contraband does not sufficiently establish backsliding by a probationer, nor does it sufficiently threaten public safety, to merit revocation without proof of the probationer's state of mind to show the violation as willful. (*Hall, supra*, 2 Cal.5th at pp. 498, 500, 503, fn. 2.)

Here, term No. 009 prohibited possession of deadly or dangerous weapons. Defendant's concern that he is unable to discern what conduct is prohibited and might accidentally possess an item prohibited by the probation condition is obviated by the fact

he is prohibited by statute from possessing certain weapons, namely firearms (§ 29800, subd. (a)(1)) and the fact that only willful violations of probation can result in revocation. As for dangerous or deadly weapons not expressly prohibited by statute, case law has made clear that knowledge of the contraband's presence and of its restricted nature is implicit in probation conditions restricting possession thereof. (*Moore*, *supra*, 211 Cal.App.4th at p. 1186.) Due process does not require an explicit scienter requirement when scienter is implicit. (*Id*. at p. 1187.)

As the court reasoned in *Moore*, *supra*, 211 Cal.App.4th at p. 1186, citing *In re R.P.* (2009) 176 Cal.App.4th 562, 567-568, the term "dangerous or deadly weapon" has a plain, commonsense meaning prohibiting possession of items specifically designed as weapons and other items not specifically designed as weapons that the probationer intended to use as such. It is unnecessary to define "dangerous or deadly weapon" or to add a knowledge requirement to prevent unwitting violations of probation where that probation cannot be revoked for innocent possession. (*People v. Contreras* (2015) 237 Cal.App.4th 868, 887 ["it is unnecessary to add a knowledge requirement to prevent unwitting violations of the condition"]; *Moore*, at p. 1188 ["addition of an express knowledge requirement would add little or nothing to the probation condition"].)

We find that term No. 009 is "sufficiently precise" for defendant to know what is required of him and not unconstitutionally vague and overbroad. (*Moore*, *supra*, 211 Cal.App.4th at p. 1186.)

3. Change in Residence Condition

Defendant contends that the requirement for him to give 24 hours' advance notice of his and his cohabitants' change in residence, without a requirement that he know of the change in advance, is both unconstitutionally vague and overbroad because it requires him to give notice of events he may not know are about to happen, such as "homelessness, instability, and unpredictable housing arrangements," which are a "fact of life, especially for many convicts, probationers, and parolees." He also believes the condition unduly infringes on his constitutional right to travel and relocate, and he requests modification of the condition.

As to the vagueness claim, the People concede, and we agree, that the condition should be modified. Specifically, the condition is unconstitutionally vague because if defendant's cohabitant moves without telling him 24 hours ahead of time, or if he is forced to move due to an emergency, defendant would not " 'know what is required of him' " at the time that the condition requires him to submit written notice. (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) Accordingly, we direct that the condition be modified to include a knowledge requirement.

Defendant also argues the post office provision, which requires him to "provide written authorization to the post office to forward mail to the new address" prior to any move, is vague and overbroad and "susceptible to arbitrary and unfair enforcement" as he could be in violation of probation "without doing anything wrong." According to defendant, "[i]t is not a stretch of the imagination that the Post Office may fail to properly

record a change of address request or may fail to properly forward mail pursuant to such a request." Out of an abundance of caution, we will modify this provision as well to include a knowledge requirement.

IV

DISPOSITION

Probation condition No. 008A is modified to read: Keep the probation officer informed of the place of residence and cohabitants and give written notice to the probation officer twenty-four (24) hours before any move or change in cohabitants and address, or as soon as he reasonably becomes aware of a move or change in cohabitants or address, but no later than 24 hours after the move or change in cohabitants or address. Provide written authorization to the Post Office to forward mail to the new address twenty-four (24) hours before any move or change in address, or as soon as he reasonably becomes aware of a move or change in address, but no later than 24 hours after the move or change in address.

Probation condition No. 008F is modified to read: Permit visits and searches of places of residence by agents of the Probation Department and/or law enforcement for the purpose of ensuring compliance with the terms and conditions of probation; not to do anything to knowingly interfere with this requirement, or to knowingly deter officers from fulfilling this requirement. Probationer shall notify the probation officer of any locked gates and fences, and provide the probation officer with the means to access probationer's residence without having probationer unlock a gate or fence (for example,

by supplying the probation officer with a key to the gate or fence). Probationer shall notify the probation officer of any animals at his residence, and comply with the officer's reasonable requests concerning animals.

In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
Acting P. J.

We concur:

SLOUGH
J.

FIELDS
J.